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No. 437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

UNITED STATES OF AMERICA, PETITIONER

v.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 103-127) is not reported. The opinion of the Circuit Court of Appeals (R. 346-354) is reported in 97 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1938. (R. 355.) A petition for rehearing (R. 355-357) was denied July 25, 1938 (R. 358). The petition for a writ of certiorari was filed October 25, 1938, and was granted November 21, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where claims for refund of more than $10,000 in taxes overpaid for several years are disallowed and suit is thereupon brought in the District Court to compel the refund, whether jurisdiction to hear the suit is lost by reason of the circumstance that the only defense relied on is that taxes were owing for other years and that the overpayments have been credited against such other taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, p. 32.

STATEMENT

During all the years herein mentioned Minnesota and Ontario Paper Company was for income-tax purposes affiliated with several other corporations, and with them filed consolidated returns. (R. 78, 134.)[1] The returns filed for the years 1922 to 1925 each showed a substantial tax owing, which the company paid to one Willcuts, then Collector of Internal Revenue for the District of Minnesota but not in office when this suit was commenced. (R. 78-80, 135-137.)

Later discovering facts indicating overpayment, the company filed claims for refund for each of these same four years. (R. 79-80, 135-137.) Negotiations resulted in a so-called closing agreement, entered into under Section 606 of the Revenue Act of 1928, *infra*, p. 33, and approved by the Secretary of the Treasury on July 7, 1933, wherein the Commissioner of Internal Revenue and the taxpayer and affil-

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[1] All facts pertinent to this appeal were stipulated. (R. 133-243.) No reference is made to facts bearing upon issues that have been abandoned or which do not appear pertinent to the arguments advanced in this Court.

Where the word "taxpayer" is used, reference is to the company except as the context otherwise indicates.

iated concerns agreed as to the proper amount of tax liability for each of the years 1922 to 1925, and also, with the exception of one item specifically reserved, for each of the three years immediately succeeding. By the agreement it was determined that the company had overpaid the tax for 1922 by $49,318.77, for 1923 by $29,427.69, for 1924 by $23,904.23, and for 1925 by $7,800, and the Commissioner delivered to the company certificates of overassessment so showing. (R. 88, 144, 214-218, 95-97, 145-147.) The overpayments thus agreed upon were determined on the basis of the grounds for refund specified in the claims on file. (R. 97, 147.)

As provided by Section 3226 of the Revised Statutes as amended by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33, the Commissioner on August 31, 1933, mailed the taxpayer written notice that its claims for refund for 1922 to 1925 "were disallowed to the extent indicated" in the certificates of overassessment. (R. 97, 146, 239-240.) The certificates in turn stated that the overpayments were "refunded or credited" as therein indicated, and then showed that the overpayments, together with the interest thereon, were not being refunded but were instead being credited to taxes claimed to be owing for other years. (R. 95-97, 145-146, 219-233.) Thereupon the respondents, trustees of the estate of the company, then and now debtor in reorganization proceedings under Section 77B of the Bankruptcy Act (R. 77, 134), began this suit to enforce the claims for refund of the overpayments, together with interest thereon.[2]

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[2]Suit was brought in August 1934. (R. 15, 109.) Respondent Archer was not appointed trustee until September 29, 1934. (R. 77, 134.) He was joined as plaintiff by order dated February 14, 1935. (R. 53-54.) Between July 11, 1934, and September 29, 1934, respondents Jaffray and Robinson were temporary trustees. (R. 77, 134.)

Originally the suit sought refund also of $7,758.58 paid to the Collector for 1928. (R. 12.) However, computations made by the trial court (R. 126) dem-

All the foregoing was alleged in the petition. (R. 1-6.) The petition did not stop there, however, but instead proceeded to allege the reasons advanced by the Commissioner for his refusal to return the money and why such reasons were not well-founded. It set out (R. 5-6, 10-12), as the record shows and the trial court found (R. 84-87, 95-97, 141-143, 145-146), that the overpayments were applied as credits against income taxes claimed to be owing for 1926 to 1928 on account of the one item specifically reserved in the closing agreement, and that interest on the overpayments was applied in part as a credit against withholding taxes claimed to be owing for 1921, the balance being applied as credits against similar taxes for 1930 and 1931. The withholding taxes for 1930 and 1931 were concededly owing and hence no attack was made upon the credits to those years. As to the other credits, however, the petition alleged further facts (R. 6-14), also shown by the record and found by the trial court (R. 80-84, 89-95, 137-141, 147, 270-280), designed to establish that no income taxes were lawfully owing for 1926 to 1928 and that no withholding taxes were lawfully owing for 1921.[3]

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onstrated that this amount was properly owing regardless of the validity of the ground for refund urged in the claim filed with respect thereto. Demand for refund of this amount was therefore abandoned, and we make no further reference to it.

[3]The taxes for 1926 to 1928 were attacked on the merits only. With respect to the 1921 tax, the petition alleged invalidity on several grounds. One of them related to whether the statute of limitations had run against collection, all the others going to the merits. (R. 12-14, 119.) The conclusion of the trial court that the credit to 1921 was invalid was based solely on the merits (R. 102, 118-123), no ruling whatever being made on the question of collectibility (R. 123-124). The Government did not contest this portion of the trial court's decision before the Circuit Court of Appeals. However, in its brief in that court (pp. 34, 54, 55, 66) it conceded that the withholding taxes were barred. It follows that as the record now stands the credit to 1921 was invalid both because no taxes were ever lawfully owing for that year and because collection was barred.

Upon the merits the trial court found substantially for the taxpayer. It held as a consequence that to the extent the deficiencies for 1921, 1926, 1927, and 1928 were erroneously determined the Commissioner had no lawful right to apply the overpayments thereto as credits and therefore was without lawful right to refuse to return the company's money, and ordered that to such extent the overpayments for 1922 to 1925 should be refunded. (R. 98-103.) Upon appeal the judgment of the District Court was ordered modified in so far as necessary to give effect to a holding by the Circuit Court of Appeals that the deficiencies for 1926, 1927, and 1928 were in part properly determined, and as so modified was affirmed. (R. 347-354.)

The correctness of the conclusions of the Circuit Court of Appeals upon the merits is not disputed by the Government in this Court. The only question here presented is whether the District Court had power to hear the suit.

SUMMARY OF ARGUMENT

Section 24 (20) of the Judicial Code is the only jurisdictional statute. Under it the District Courts have jurisdiction of suits to recover internal-revenue taxes if it appears (1) that the taxes were collected by a collector of internal revenue, and (2) that the collector is out of office when suit is commenced. Both requirements were met at bar, and it follows that the District Court had power to entertain the proceeding.

The Government's argument goes not to jurisdiction but to whether respondents' cause of action for recovery of the overpayments for 1922 to 1925 was destroyed by the Commissioner's act in crediting such overpayments to the taxes assessed for 1921, 1926, 1927, and 1928, which taxes were not legally owing.

The Commissioner's act in making the credits did not destroy respondents' cause of action. It was not conclusively correct, as petitioner contends, but only presumptively so—a defense which the Government was free to interpose to defeat refund but which respondents were equally free to attack as invalid since the assessments thereby satisfied were for taxes not legally owing. The authorities are uniform to this effect, and this Court has indicated that its view is the same. *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 542-543. A contrary holding would make the Commissioner master in respect of jurisdiction of the District Courts and permit him to defeat every suit for refund, however meritorious, by the simple expedient of determining a deficiency for another year and crediting the overpayment thereto, even after the taxpayer has commenced his proceeding.

ARGUMENT

THE DISTRICT COURT HAD JURISDICTION, THE REASON FOR RETENTION OF THE TAXPAYER'S MONEY BEING A MATTER ONLY OF DEFENSE, NOT A MATTER OF POWER TO ENTERTAIN THE SUIT

The suit is one for the recovery of internal-revenue taxes illegally collected for the years 1922 to 1925. The District Court's jurisdiction to hear it is therefore governed by Section 24 (20) of the Judicial Code as amended, *infra*, p. 32, which provides that where, as here, the amount claimed exceeds $10,000, the District Court shall have jurisdiction if the following two facts appear: (1) that the taxes were collected by a collector of internal revenue; and (2) that such collector was out of office when the proceeding was commenced. See *Lowe Bros. Co.* v. *United States*, 304 U. S. 302, 305-306. Both requirements were met here: (1) the taxes were collected by Willcuts, collector of internal

revenue for the District of Minnesota, and (2) Willcuts was not in office when the suit was begun. (R. 1, 2-4, 78-80, 135-137.) The manifest conclusion is that the trial court had power to entertain the proceeding.[4]

That there was full compliance with Section 24 (20), the Government does not dispute. Since no other statute is pertinent, and since jurisdiction of the inferior Federal courts is attributable solely to Congressional enactment (*Gregory* v. *Van Ee*, 160 U. S. 643, 646), it seems that the matter should end there. It appears, however, that that is

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[4]While jurisdictional requirements are governed by Section 24 (20), certain other conditions, essential to maintenance of suit when insisted on but not jurisdictional in character (see *Tucker* v. *Alexander*, 275 U. S. 228, 231, and *Guettel* v. *United States* (C. C. A. 8th), 95 F. (2d) 229, 231. Cf. *Fountleroy* v. *Lum*, 210 U. S. 230, 234-235, and *Burnet* v. *Desmornes y Alvarez*, 286 U. S. 145, 147-148), are imposed by Revised Statutes, Section 3226, as amended by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33. In the interest of clarity we show compliance with such other conditions also:

a. Claims for refund must have been filed. They were. (R. 3-4, 79-80, 135-137.)

b. They must have been filed within the times prescribed by Section 284 (b) of the Revenue Act of 1926, *infra*, p. 35. There was compliance here as respects the amounts of which refund is sought. (R. 78-80, 103, 135-137, 347.) This the Government conceded in its brief (p. 7) in the Circuit Court of Appeals.

c. The suit must not have been brought within six months of the filing of the claims since the Commissioner during that period rendered no decision on the claims. Much more than six months expired before suit was begun. (R. 50, 78-80, 135-137.)

d. The suit must have been commenced within two years after the mailing of notice of disallowance of the claims. Such notice was mailed August 31, 1933 (R. 97, 146, 239-240); the suit was begun August 29, 1934 (R. 50).

e. Recovery must be sought on grounds specified in the claims. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. That is the case here; the claims specified grounds on the basis of which the overpayments agreed upon in the closing agreement (R. 88, 214-218) were determined. (R. 97, 147.) The agreement is of course conclusive in the absence of fraud, malfeasance, or misstatement of material fact, and by it the parties not only dispensed with the necessity of but also precluded alleging and proving the grounds specified in the claims. *Wolverine Petroleum Corp.* v. *Commissioner* (C. C. A. 8th), 75 F. (2d) 593, 595-596. See also R. 69, 104-105.

not the case, but such controversy as persists is altogether non-jurisdictional in character.[5]

If we read aright, what the Government contends is that the taxpayer was without a cause of action for 1922 to 1925 because the Commissioner, while not denying that wrongful collection of taxes had been made for those years, applied the overpayments against taxes he claimed were owing for other years. (Br. 13.) But the question whether there was a cause of action goes, not to the power of the court to hear the controversy, but to the merits—to whether, in granting relief, the court properly discharged its duty in deciding the case. As this Court said in *General Invest. Co.* v. *New York C. R. Co.*, 271 U. S. 228, 230:

> By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * *.

To the same effect is *Burnet* v. *Desmornes y Alcarez*, *supra*, an action for filiation wherein the question was at issue whether certain statutes were jurisdictional which prohibited suit unless brought within certain defined periods. The opinion states (p. 147):

> Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defense. When a court has general juris-

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[5] It is indeed anomalous, after having sought and gained review in this Court solely on the question of jurisdiction, that nowhere in its entire argument does the Government once cite or refer to the only statute by which jurisdiction is conferred and governed.

The question whether under the complaint or upon the facts found plaintiffs were possessed of a cause of action for 1922 to 1925 was not included in the petition for certiorari. Cf. *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 604-605, and *Helvering* v. *Taylor*, 293 U. S. 507, 511-512.

> diction to try the question whether an alleged right exists, the rules that determine the existence of the right ordinarily govern the duty only of the court, not its power. * * * Even words in a statute that might seem to affect the power of the court, such as "no action shall be brought," in the statute of frauds, are assumed without question merely to fix the law by which the court should decide * * *.
>
> But it is said that, whether the statutes go to the jurisdiction or not, they establish a condition precedent. Of course, all defenses disclose conditions precedent to the successful maintaining of the action; but more than that must be meant * * *.

In like manner it was said in *Fauntleroy* v. *Lum*, *supra* (pp. 234-235):

> No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not.

Jurisdiction under Section 24 (20) is in no way dependent upon whether credit has been made of the taxes for whose recovery suit is brought. The statute is its own criterion and it contains no such limitation. What the Commissioner does with the money conceivably may bear on the right to ultimate relief, but it does not deprive the court of the power to hear and decide. Whether the taxpayer had a cause of action is something apart from the question of jurisdiction;

the two are distinct under Section 24 (20), and answering the one does not dispose of the other.

But whether or not the question of existence of a cause of action is jurisdictional in character, petitioner's argument on the point proceeds from patent fallacy. It is builded on the assumption (Br. 13) that after credit of the overpayments for 1922 to 1925 plaintiffs could no longer have a cause of action for those years.[6] That assumption, we submit, is wholly unwarranted.

Plaintiffs' cause of action was and is the act of the collector in collecting more taxes for 1922 to 1925 than the law exacted. *Patton* v. *Brady*, 184 U. S. 608, 613-615; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4; *Lewis* v. *Reynolds*, 284 U. S. 281, 283; *Lowe Bros. Co.* v. *United States*, *supra*, p. 306; *Guettel* v. *United States*, *supra*, p. 230. It persists until the taxpayer has received full and proper restitution. The circumstance that the overpayments are credited to taxes claimed to be owing for other years may or may not effect such restitution, depending upon whether the taxes so claimed were in truth owing. But that is a question as to which the Commissioner has no ultimate fiat. Indeed, even if they were owing, it does not follow that suit might not thereafter be brought in respect of the years of overpayment, and there is in the decisions neither statement nor intimation to the contrary. As the Govern-

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[6]The Government says at the same time (Br. 13) that the act of credit "cannot give rise to a cause of action". If after that act the taxpayer has no cause of action for the year of overpayment to the collector, and if that act does not in turn create another, then obviously the taxpayer has no cause of action at all, for collection and credit are the only two things of which the taxpayer could possibly complain. This conclusion is of course the inevitable concomitant of the assertion (Br. 11) that the making of a credit is the Commissioner's "absolute right"; what a man has an "absolute right" to do can give another no cause for complaint.

ment points out (Br. 9), each taxable year stands by itself, and the act of crediting to one year does not obliterate or in any sense eliminate or destroy the fact of overpayment as to the other; quite the reverse, it acknowledges that fact, for otherwise there would be nothing to credit. The overpayment remains, and so does the cause of action springing therefrom; the credit elsewhere is simply a defense available in a proceeding to enforce its return.

It detracts not to point out, as does petitioner (Br. 11), that by Section 284 (a) of the Revenue Act of 1926, *infra*, p. 35,[1] it is provided that an overpayment "shall • • • be credited" against other taxes "then due". If credit is by this statute obligatory, it is obligatory only as respects other taxes "then due", and, ultimately, taxes "due" are only those which the law declares are due, not those by the Commissioner determined to be due. Determination or assessment of a deficiency is merely evidence that in the Commissioner's judgment the law demands more of the taxpayer than he has paid. But the Commissioner's judgment may be wrong. If it is, credit of the overpayment to the deficiency is an unlawful act, just as is cash collection of an ill-advised deficiency, and Section 284 (a) does not make it otherwise.

All that the law does is say that what the Commissioner declares is right and lawful shall be deemed right and lawful until the contrary is made to appear. For example, in *McCarl* v. *United States ex rel. Leland* (App. D. C.), 42 F. (2d) 346, certiorari denied, 282 U. S. 839, the Commissioner determined an overpayment for 1919 and a deficiency

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[1]The Government refers to Section 322 (a) of the Revenue Act of 1932, but Section 322 seems to relate only to overpayments of taxes imposed by that Act. The corresponding provision relating to overpayments of taxes imposed for the years 1922 to 1925 appears to be Section 284 (a) of the Revenue Act of 1926.

for 1918. The taxpayer appealed to the Board of Tax Appeals from the deficiency, and while review was pending there brought mandamus to compel refund of the overpayment. This latter procedure was not permissible, and in the course of so holding the court said (p. 347):

> The ruling as to the deficiency assessment was prima facie correct. * * * [Citing cases.] Prima facie, therefore, the amount of the deficiency assessment was "then due" the government, but owing to the appeal taken by the taxpayer the final balancing of the account could not be had until the termination of the appeal.
>
> In our view it was the intent of Congress in the enactment of Section 284 to require immediate refund of overpayments only in the event of a net balance in favor of the taxpayer. * * *

A generally analogous situation was dealt with by the same court in *United States ex rel. Cole* v. *Helvering*, 73 F. (2d) 852. The *McCarl* case was referred to, and of it the court said (p. 853):

> We ruled that prima facie at the time the Commissioner made the determination the amount of the deficiency assessment was "then due", but that owing to the taxpayer's appeal final balancing of the account could not be had until the determination of the appeal.

Obviously the right of the Commissioner to credit an overpayment for one year to a deficiency or assessment for another is a conditional right, not an absolute one, and the Government itself so states elsewhere in its brief (See Br. 35, bottom.) The Commissioner's determination that there is a deficiency is itself only presumptively correct, and it is illogical to suppose that satisfaction of the deficiency by credit has attached to it any greater degree of finality. It seems hard to believe that enlightened jurisprudence would accept the suggestion that the quality of finality inheres

in an *ex parte* act of the Commissioner and that thereby the taxpayer is denied the right to be heard with respect to its validity for any purpose, subject only to a right to resort to another proceeding involving still another tax year. Whether the deficiency is owing is a matter of defense, not of jurisdiction, when suit is brought for refund of the overpayment. Validity of the deficiency is then determinable, provided, of course, contrary to what was true in the *McCarl* case, jurisdiction to review the deficiency has not already been acquired by another tribunal. If the deficiency is lawfully owing, then to that extent the overpayment may be retained, and all the taxpayer is entitled to have refunded is the "net balance", if any. Plainly the question of credit goes to defense, not to jurisdiction. As the trial court said in this case (R. 106):

> The fact that the overpayment has been credited upon an alleged deficiency may properly be assigned as a reason why the tax was not refunded, and if the application upon the alleged deficiency was warranted by law, then, of course, there is an absolute defense to any action that may be brought to recover the overpayment; but the refusal to return the overpayment remains. If, for instance, a claim for refund was filed and no decision was made by the Commissioner within the six months' period, then the claimant, under the statute, could bring suit. Certainly, if suit were brought under these circumstances, a defense that the taxpayer's position was correct, but that the overpayment had been applied to a deficiency of another year, would not justify a dismissal of the action. The mere asserted defense would not dispose of plaintiff's cause of action and require him to drop his suit and file a claim for refund for the years to which the credit had been applied. Such a defense would simply constitute a reason why the overpayment had not been returned, and if the application

was lawful, such a defense would dispose of the merits of the controversy.

See also *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543. Cf. *McEachern* v. *Rose*, 302 U. S. 56.[8]

This is patently sound reasoning, and in this connection it may be pointed out that so far as we are aware there is not a single authoritative decision in which it has ever been held, or even remotely suggested, that under facts such as those at bar refund may be sought only as to the years to which the overpayments are credited and that suit will not lie to recover the overpayments themselves, the theory pursued here. Certainly neither case cited by petitioner so holds.

It is true that in *United States* v. *Swift & Co.*, 282 U. S. 468 (Br. 18-19), the suit was brought for refund of an overpayment collected by credit (p. 469), but the sole question there discussed and decided related to the effective date of such collection; so far as the opinion indicates, no consideration whatever was given to whether suit for the year of overpayment by credit was proper, much less to whether the taxpayer could have sued for the year of overpayment in cash. Perhaps it is fair to indulge the presumption that this Court regarded, or at least assumed, that the procedure followed was permissible, but that is vastly dif-

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[8]The foregoing is in no way opposed to what this Court said in *Bull* v. *United States*, 295 U. S. 247, 259-260, as the Government implies (Br. 9-10). We read the statement in that case (p. 260) that "The assessment is given the force of a judgment" as being limited to purposes incident to initial collection. And if an assessment is an absolute and irrevocable determination that taxes are then due "regardless of the correctness of the assessment" (Br. 9-10), this Court would never there have said (p. 260) that the United States "took more than it was entitled to" or that "Retention of the money was against morality and conscience."

If an assessment were anything more than a *prima facie* determination that taxes are due, then of course the Commissioner could never lawfully abate an assessment.

ferent from saying that its decision is authority for the proposition that that procedure was exclusive and that the taxpayer could not have sued for the years of original overpayment—an issue not even in the case. The *Swift* decision does not support petitioner's position; the question did not so much as lurk in the record. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511.

Perchance it is not going too far to say that the question did lurk in the record in *United States* v. *Botany Worsted Mills* (C. C. A. 3d), 98 F. (2d) 880 (Br. 19-20). But a reading of the opinion in that case demonstrates unmistakably (p. 883) that the decision there was made to turn, not on any jurisdictional issue, but on interpretation of the statute governing interest—whether the taxpayer should be permitted to receive an advantage over other taxpayers in all respects similarly situated except for the circumstance that their refunds were made at an earlier date.[9]

As already stated, so far as we have been able to ascertain there is no decision which by express holding is in conflict with the conclusion reached below. It is true that there are several cases in which it has been held that the taxpayer upon facts analogous to those at bar has a cause of action for the years to which the overpayments are applied as credits,[10] but in none of them is it declared that there is no

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[9]The court in the *Botany* case did in the course of its opinion make the statement (p. 883) that the credit there made "must be regarded as a valid closing of the accounts between the Government and the taxpayer so far as the overpayment of 1918 tax was concerned." It would be a curious doctrine indeed which would permit one of two parties to a transaction, over the other's protest, to make a disposition of his money which, even though unlawful, would nevertheless constitute a binding closing of accounts between them.

[10]To this category belong such cases as *United States* v. *Gallagher Co.* (C. C. A. 6th), 83 F. (2d) 368, *United States* v. *Reeves Bros. Co.* (C. C. A. 6th), 83 F. (2d) 121, certiorari denied, 299 U. S. 573, and *Gans S. S. Line* v. *Bowers* (C. C. A. 2d), 82 F. (2d) 181, certiorari denied, 298 U. S. 676.

cause of action for the years of original overpayment or that the District Courts are without power to entertain suits for such years. On the other hand, *United States* v. *Bertelsen & Petersen E. Co.* (C. C. A. 1st), 95 F. (2d) 867, 98 F. (2d) 132 (now pending on a writ of certiorari, No. 416, October Term 1938), is in complete accord with the decisions below, holding specifically (95 F. (2d) 868, 98 F. (2d) 135) that District Courts have jurisdiction in cases of this kind and that it is proper to sue for the years of overpayment in cash. And the Court of Claims has gone so far as to hold, consistently, that those are the only years for which suit may be brought. *Parks & Woolson Mach. Co.* v. *United States,* 58 F. (2d) 868, certiorari denied, 287 U. S. 634; *Rosenstadt & Waller* v. *United States,* 7 F. Supp. 287; *American Steam Conveyor Corp.* v. *United States,* 10 F. Supp. 571, certiorari denied, 296 U. S. 599.[11]

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[11]In connection with citation of the *Swift* case and as support for its contention that respondents have no cause of action for 1922 to 1925, petitioner makes the statement (Br. 19) that "it is impossible for a single sum paid by a taxpayer to be an overpayment in that sum for two different taxable years." The Court of Claims agrees with that statement but takes sharp issue with the conclusion that the year of overpayment must be the year of collection by credit rather than the year of collection in cash. In the *Rosenstadt* case it said (pp. 288-289):

"A credit is always the result of a prior payment on a tax and if, when the credit was made, it was declared to be a payment on another tax there would be two payments on different years, although only one sum had been received by the government, at one time, and for one purpose. * * * it is not reasonable to assume that Congress intended to provide that when a credit is made of an overpayment the period of limitations for its recovery is thereby extended, thus giving an advantage to the taxpayer if an attempt has been made to make a credit over the taxpayer whose overpayment has not been credited."

If respondents could bring suit only for 1921, 1926, 1927, and 1928, then under the decision in the *Lowe Bros.* case, *supra,* the only forum with jurisdiction to hear and decide would have been the Court of Claims, and petitioner intimates (Br. 18) that respondents should have gone there. Had that been done, respondents would of course have been turned out of court without a hearing on the merits. Whether the Court of Claims is right or wrong is beside the point, and need not be decided in this case. As a practical matter,

What appears to lead the Government astray is the circumstance, repeatedly adverted to in the Government's brief (pp. 8, 14, 15) that, as the case developed, there was no controversy between the parties as to whether the taxpayer had overpaid its taxes for 1922 to 1925, but only as to whether it had overpaid its taxes for 1921 and for 1926 to 1928; hence, concludes the Government, it must be true that the taxpayer had no cause of action for the former years. We submit that the conclusion is an obvious *non sequitur.*

As already stated, the primary wrong of which respondents complain is the collection of a greater amount in taxes for 1922 to 1925 than the law exacted. But that point, important as it is, is not the thing that is ultimately dispositive. Of course the issue of whether there was in fact an excessive collection is one the affirmative of which the taxpayer had to prove and did prove as part of its case, and the Government elected not to dispute it. But that is nevertheless not the final issue. The final issue always has been and still is whether, having established the fact of overpayment of taxes, the taxpayer is entitled to their refund. The taxpayer says it is; the Government contends the con-

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however, the only years as to which respondents could bring suit with prospect of being able to have the wrongs done them corrected were the years 1922 to 1925. Of course, with respect to suit for those years, the argument advanced by the Government would apply with equal force whether the suit were brought in the Court of Claims or in the District Court; which shows that the argument is in reality not one going to jurisdiction.

The Government intimates (Br. 10) that notices of deficiency were sent to the taxpayer with respect to 1921, 1926, 1927, and 1928 before the assessments for those years were made, and that respondents had an opportunity to contest the liability asserted for those years by filing petitions for review with the Board of Tax Appeals. Notices of deficiency were never issued and no such course of procedure was ever open to respondents because the taxpayer was in receivership and, later, in bankruptcy. See Section 274 (a) of the Revenue Act of 1932, *infra*, p. 32. Of course no claims for those years were ever filed in the receivership or bankruptcy proceedings.

trary. That is the ultimate controversy, and it is a controversy in respect of taxes paid for 1922 to 1925.

It is wholly without significance that the complaint itself shows that the overpayments for 1922 to 1925 were applied as credits against the taxes claimed for 1921, 1926, 1927, and 1928, and that the Government made no attempt to dispute the allegation that overpayments had been made, either because it was without or simply elected not to interpose any defense to such allegation, but instead did no more than assert that it had a right to withhold the money in satisfaction of the taxes claimed for the other years—an assertion which it is now determined was without foundation. It is sufficient answer to point out that jurisdiction is neither acquired nor lost by reason of the number or character of the defenses interposed on the merits. Suppose, for example, that petitioner had denied the fact of overpayment and, in the first instance, had done nothing more.[12] In that event the existence of jurisdiction would have been obvious, and presumably the Government would so concede. If upon trial, however, the proof adduced by the complainants had been sufficiently imposing to induce the Government to abandon that defense and to urge instead that the overpayment had been credited to other years, no one would suppose that the exigencies of the Government's position could have had so far-reaching an effect as to have compelled the court to dismiss on the ground that its authority to hear

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[12]Petitioner seems to assume (Br. 14-15) that it would have had no right to make such denial, on the ground that the fact of overpayment was established by the closing agreement. There is no warrant for any such assumption. The closing agreement would simply bear on the ultimate efficacy of the denial, not on the right to make it; before the Government could make its denial effective it would have the burden of establishing that the agreement was for some reason inoperative. See Section 606 of the Revenue Act of 1928, *infra*, p. 33.

terminated upon collapse of the first defense. Clearly, as the courts below pointed out (R. 106, 351), the fact of credit is a matter of defense, not of jurisdiction. As said as long ago as *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 824:

> The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. • • •

Whether a court has jurisdiction to hear a case is determined, in the first instance at least, by the allegations of the bill of complaint. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305-308; *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271, 273; *Flanders* v. *Coleman*, 250 U. S. 223, 227, 228; *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 118. But in examining a complaint with a view to such determination, it is established law that only those allegations will be considered as are confined to a statement of the plaintiff's cause of action. *Gully* v. *First National Bank*, 299 U. S. 109, 113; *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, 480; *The Fair* v. *Kohler Die & S. Co.*, 228 U. S. 22, 25; *Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149, 152-154; *Boston & M. Consol. C. & C. Min. Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, 640. As said in the *Gully* case (p. 113):

> • • • the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiffs' cause of action and anticipates or replies to a probable defense. • • •

In the complaint at bar the statement of the plaintiffs' cause of action consists essentially and solely of the allegations that taxes were collected for 1922 to 1925, that the

taxes collected were excessive, that claims for refund were filed, and that the claims were disallowed or rejected. The complaint could have stopped there, as the court said in *Moses* v. *United States* (C. C. A. 2d), 61 F. (2d) 791, 794, certiorari denied, 289 U. S. 743, with respect to the complaint in that case, and as the District Court here pointed out (R. 69, 62), closing with the allegation that the Commissioner had failed and refused to make the refunds, which, commonly, is the closing allegation by the plaintiff in any suit for refund, and is the circumstance, this Court has said (*United States* v. *Felt & Tarrant Mfg. Co.*, *supra*, p. 273), which makes the suit necessary. The remaining allegations —that taxes were claimed for other years, that the Commissioner had credited the overpayments thereto, and that such other taxes were not legally owing—simply anticipated the defense and replied thereto, and were in the nature of surplusage. Since it is upon these latter allegations that the Government bases its contention, and since there was jurisdiction without them, it follows, as already indicated, that the fact of credit has no bearing on the question of the District Court's power to entertain the proceeding. And for the same reason it is equally inconsequential that the dispute as to lawfulness of the taxes claimed for 1921, 1926, 1927, and 1928 and of the credits made thereto may have proved to be more serious than the question of overpayment of taxes for 1922 to 1925. As said in the *Healy* case, *supra*, p. 480:

> • • • the plaintiff is absolute master of what jurisdiction he will appeal to; and if he goes to the district court for infringement of a patent, unless the claim is frivolous or a pretense, the district court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious dis-

> putes. • • • Jurisdiction generally depends upon the case made and relief demanded by the plaintiff; and as it cannot be helped, so it cannot be defeated by the replication to an actual or anticipated defense contained in what used to be the charging part of the bill. • • •

In like manner it was said in the *Kohler* case, *supra*, p. 25:

> Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a "suit arising under" the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defense, even when anticipated and replied to in the bill. • • • Conversely, when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim. • • •

See also *Louisville & N. R. Co.* v. *Mottley*, *supra*, p. 152.

The foregoing considerations render inescapable the conclusion that the Commissioner's act whereby he credited the overpayments to the taxes claimed for the other years goes, not to the question of jurisdiction, but simply to the question of defense, and this is the view to which the courts have consistently adhered. We have already referred to the holding of the courts below in the instant matter and to the decision in *United States* v. *Bertelsen & Petersen E. Co.*, *supra*. We cite here some of the other cases.

In *Libby, McNeill & Libby* v. *United States* (Ct. Cls.), 9 F. Supp. 673, a taxpayer overpaid its 1917 income tax. The Commissioner determined a deficiency for 1919 and to this deficiency credited the 1917 overpayment. After filing a claim for refund of the 1917 overpayment the taxpayer began suit for its recovery, exactly as at bar. The

Government raised precisely the same argument it raises here. Of it the court said (p. 680):

> Counsel for defendant now contend that the plaintiff is not entitled even to this last-named sum for the reason, as we understand the argument, that the overpayment for 1917 had been applied on the deficiency for 1919 and thus had become an overpayment for that year. No application for refund for 1919 was filed and it is therefore contended that the plaintiff can recover nothing. This contention ignores the fact that the plaintiff is suing to recover part of an overpayment on taxes of 1917 for which a refund claim was duly filed. It is true that the Commissioner undertook to apply this overpayment on the deficiency for 1919, but we have held above at the time the Commissioner so acted the 1919 taxes were paid and settled and consequently that the Commissioner could not lawfully make such an application. In other words, his action was a mere nullity. * * *

This short, simple, and obviously sound statement answers irrefutably every contention petitioner makes. The essential facts in the *Libby* case are identical with those at bar, even to the point that collection of the 1919 deficiency was not barred.[18]

In *American Woolen Co.* v. *United States*, 18 F. Supp. 783, 21 F. Supp. 125, 1021, the same court said (18 F. Supp. 788):

> We have held that when a taxpayer has a decision of the Board in his favor he can bring suit thereon. But this does not mean that where the Commissioner has applied an overpayment found by the Board in the manner required by law, the taxpayer can still recover by

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[18]The Government attempts (Br. 22) to distinguish the *Libby* case on the ground that in that case all taxes owing for the year to which the overpayment was applied as a credit had been paid. That is precisely the situation at bar.

> suit the amount thereof. When the Government shows, as it has in this case, that the amount of the overassessment was credited on a deficiency then due under the decision of the Board, it is a complete defense.

Petitioner says of the *American Woolen* case (Br. 20) that it supports the Government's position rather than that of the taxpayer, presumably on the ground that it was there held that a complete defense is established when it is shown that the overpayment whose refund is sought has been applied as a credit "in the manner required by law". The Government neglects to emphasize that the deficiency there satisfied by credit was not merely presumptively correct, which was the situation at bar, but had been found correct in a judicial determination, which is vastly different. The Government's contention that a taxpayer suing for refund of an overpayment is precluded from questioning the validity of an unreviewed deficiency for another year to which the Commissioner has applied the overpayment as a credit, is clearly at odds with what this Court said in *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, 62-63:

> The burden was on the petitioner, seeking a refund of its tax, to prove its allegation that the overassessment for 1918 had been illegally credited upon the tax for 1917. • • •

That the fact of credit is simply a defense subject to attack by the taxpayer and that the procedure followed at bar is not merely permissible but is the approved course is clear from what this Court recently said *obiter* in *United States ex rel. Girard Co.* v. *Helvering*, *supra*. An overpayment had there been determined by the Board. The taxpayer brought mandamus to compel refund. The Court held that mandamus was not the proper remedy and that

the right to the refund should be determined by bringing a suit for refund. The Court said (pp. 542-543):

> When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, Sec. 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the recovery of any refund to which he is entitled. See *National Fire Insurance Co.* v. *United States*, 52 F. (2d) 1011, 1013-1014; *James* v. *United States*, 38 F. (2d) 140, 143; *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144, 148-149. And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. See *Stone* v. *White, supra* [301 U. S. 532]; *Welch* v. *Obispo Oil Co. ante*, p. 190; *Lewis* v. *Reynolds*, 284 U. S. 281; *Crocker* v. *Malley*, 249 U. S. 223.
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> In view of what we have just decided in *Stone* v. *White, supra*, it is evident that in the circumstances of this case there is no clear duty of the Commissioner to refund the tax without securing a final adjudication of the government's right to retain it, as he may do by interposing an appropriate defense in a suit for the refund.

See also *McEachern* v. *Rose, supra*, p. 59.

What the courts below and what other courts have held in analogous cases is in the above language given unequivocal approval. What the Commissioner does with an overpayment—whether he credits it elsewhere or for other reason retains it—is purely a matter of defense which the Government is free to interpose or not, as it sees fit. Upon the question of jurisdiction it has no bearing. In a suit for refund a taxpayer is not required in the first instance to

prove that he is not otherwise indebted to the Government before he may recover the overpayment for which suit is brought. *United States* v. *First Wisconsin Trust Co.* (C. C. A. 7th), 92 F. (2d) 840, 845. In the language of the trial court below (R. 69):

> • • • the plaintiffs will have made out a prima facie case in proving the claim for refund that was filed, the facts indicating a refusal on the part of the Government to refund the taxes, and the agreement between the Government and the taxpayer as to the admitted overpayment. The proof by the Government to the effect that the overpayment was applied to a deficiency that existed in prior [other?] years will undoubtedly require the plaintiffs to go ahead with proof and sustain the burden that the Government erred in so applying the overpayment.

See also *Stone* v. *White*, 301 U. S. 532. Cf. *Lewis* v. *Reynolds*, *supra*.[14]

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[14]In *Untermyer* v. *Bowers* (C. C. A. 2d), 79 F. (2d) 9, certiorari denied, 296 U. S. 641, the taxpayer in a suit against the collector in district court was allowed to recover an overpayment for 1919 which was applied as a credit to 1918; as here, the defendant did not dispute the fact of overpayment. However, the question of "jurisdiction" was not discussed. But it is clear that if the district court had jurisdiction of the suit against the collector it would also have had jurisdiction of the suit had the Government been the defendant.

In none of the following cases was it held or suggested that there was no jurisdiction or cause of action, yet the suits were all brought, or interpreted as being brought, to recover overpayments credited to other years. *Pratt & Whitney Co.* v. *United States* (Ct. Cls.), 6 F. Supp. 574, 10 F. Supp. 148, certiorari denied, 295 U. S. 760; *First National Bank of Beaver Falls* v. *United States* (Ct. Cls.), 8 F. Supp. 484, 9 F. Supp. 424, certiorari denied, 294 U. S. 717; *Moses* v. *United States*, *supra*; *Jelke Co.* v. *Smietanka* (C. C. A. 7th), 86 F. (2d) 470, certiorari denied, 300 U. S. 669. In all these cases it was held, under Section 3226 of the Revised Statutes as it stood before its amendment by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33, that the making of the credit is the act that constitutes the disallowance or rejection of the claim for refund of the overpayment. To the same effect is the *Bertelsen & Petersen* case, *supra*, 98 F. (2d) 132. Since the amendment the official act of disallowance is of course the mailing of the letters giving notice of the disallowance, which in this case took place August 31, 1933. (R. 97, 146.)

We believe the Government misuses *Hammond-Knowlton* v. *Hartford Con-*

The wholly illogical character of the Government's contentions is even more evident when we consider their practical implications. Suppose, for example, that the present suit had been brought upon the expiration of six months after the filing of the claims for refund without a decision thereon by the Commissioner and that at that time no credits had been made. Not even the Government would doubt the existence of jurisdiction upon such facts. But suppose that after commencement of suit the Commissioner had then made the credits. Under the Government's theory the suit pending would then have to be dismissed, new claims for refund be filed for the years to which the credits were applied, and after rejection of the claims or the expiration of six months a new suit be instituted for the other years.

To illustrate further. Suppose a taxpayer makes a cash overpayment of his 1935 tax, which the Commissioner credits to a deficiency for 1928. If petitioner's argument be sound, the taxpayer would then have to sue for 1928. Suppose he does so, but that then the Commissioner decides that he was mistaken, that there was no tax due for 1928, instead determines a deficiency for 1931, "reverses" the previous credit, and applies the 1928 overpayment to 1931. Under the Government's theory the taxpayer would then have to drop his suit for 1928 and begin all over again for 1931. The process of reversal, dismissal, and new suit could go on forever. Cf. R. 107. It is not uncommon for the Commissioner to reverse a credit. He did it in *Eastman Kodak Co.* v. *United States* (Ct. Cls.), 13 F. Supp. 435, 451,

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necticut Trust Co. (C. C. A. 2d), 89 F. (2d) 175, certiorari denied, 302 U. S. 707. The credit referred to in the quotation (Br. 24) was not such a credit as those here under consideration, but the statutory credit against Federal estate taxes allowed by reason of payment of State inheritance taxes or other State death duties.

certiorari denied, 299 U. S. 581; *American Woolen Co.* v. *United States, supra,* 18 F. Supp. 783, 787, 788; *Libby, McNeill & Libby* v. *United States, supra,* pp. 678, 679; *United States* v. *Botany Worsted Mills, supra.* The fact is that even in the instant case overassessments were abated (R. 85-86, 141-142), and the credits finally made were different from those set out in the certificates of overassessment (R. 97, 146). If a taxpayer may sue only for the year to which an overpayment is credited, manifestly the possibilities for wearing him down are just about unlimited.

The fact is that the ultimate implication of the Government's contention is nothing less than appalling. If the Government's position is sound it means that the Commissioner can defeat any and all proceedings for refund by the simple expedient of determining a deficiency for another year, whether arbitrarily or not is beside the point, and by applying thereto as a credit the overpayment for whose recovery suit is brought. A doctrine that leads to that result is a formidable weapon indeed.[15]

What has already been said answers the Government's incidental contention (Br. 18, 24-27) that the present suit is not maintainable since the record does not show that there were claims for refund filed in respect of the years to which the overpayments were credited. Were more necessary, it is sufficient to point out that the requirement that claims be filed is by the governing statute, Section 3226 of the

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[15]Quite sallow in comparison is the burden which the Government says (Br. 16) will be cast on a collector if the taxpayer is permitted to sue him for the year of overpayment in cash. Moreover, as we all know, a collector has little personal interest in either the defense or the outcome of refund suits in which it happens that his name appears as the defendant. See *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 382-383.

Revised Statutes as amended by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33, made a prerequisite only to the bringing of suit, and as such obviously applies only to the years in respect of which suit is brought, in this case 1922 to 1925. Cf. *Dixie Margarine Co.* v. *United States* (Ct. Cls.), 12 F. Supp. 543, certiorari denied, 297 U. S. 713.

Moreover, there would be no point or purpose in a rule requiring the t· .payer to apprise the Government of the character and validity of its own defense, which the Government may or may not raise, as it chooses. The rules of pleading and procedure give the Government all the protection and notice it needs or is entitled to have; if the Government as a defense pleads the fact of credit elsewhere, it is the taxpayer's burden to show, if he can, that the deficiency to which the credit is applied is not lawfully owing. And from the standpoint of practical administration, the issues framed in advance of trial give the Commissioner knowledge amply sufficient to correct his mistakes without entering upon actual contest, if he is so disposed.

The baselessness of the Government's argument is further demonstrated by the fact that if the credit is not made until after suit to recover the overpayment is begun, it would be physically impossible to do what the Government insists is a condition precedent to the bringing of the suit itself.

The Government's allusion to orderly administration of the revenue and to the burden of litigation is quite patently devoid of merit.[16]

The Government submits for determination (Br. 28-37) the question whether the effect of credit of an overpayment

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[16]As already pointed out, the filing of a claim for refund is a procedural, not a jurisdictional, prerequisite. Note 4, *supra*.

to a deficiency whose collection is barred by the statute of limitations is different from the effect of credit to a deficiency not so barred, and to that end asks for interpretation of Sections 607 and 609 of the Revenue Act of 1928, *infra*, p. 34.

The question is not one in respect of which certiorari was asked or granted, and we understand (Br. 30) that the Court in similar circumstances has declined to deal with the question. Moreover, upon the record at bar the tax claimed for 1921 was not owing upon the merits and so is in a category with the taxes claimed for 1926, 1927, and 1928.[17]

Under the circumstances we do no more than submit a short statement of our view, which we believe coincides with petitioner's.

The effect of Sections 607 and 609 is simply to deprive the Government of a defense by way of set-off which it would otherwise have, and to place such deficiencies in the same category as deficiencies determined despite the fact that all taxes legally owing have been paid. In the absence of some such provisions as those contained in Sections 607 and 609 the Government, in a suit for refund of overpaid taxes, could avail itself, as a set-off, of the fact that other taxes have not been paid, even though such other taxes, because of limitations, would not be collectible in an affirmative proceeding. *Lewis* v. *Reynolds, supra; United States ex rel. Girard Co.* v. *Helvering, supra,* p. 543. Sections 607 and 609 simply withdraw this possible defense to repayment. "They preclude, in a suit by the taxpayer against the collector or the government, reliance on a claim against the taxpayer, barred by statute, as a set-off, or counterclaim." *Stone* v. *White, supra,* p. 538. In other words, they declare

[17]See note 3, *supra.*

that the claim shall be treated as though the taxes represented thereby had never legally been owing, rather than as once owing but rendered uncollectible by limitations. Sections 607 and 609 thus operate to place barred deficiencies in a category with deficiencies not barred but unlawfully determined on the merits.

Under this view collection of the barred deficiency is not "void" in the sense that the situation is the same as though no collection had been made. As in the case of a deficiency that is illegal for the sole reason that the taxes were not owing on the merits, collection of a barred deficiency, whether in cash or by credit, is presumptively correct and lawful until the opposite is made to appear, just as in the present matter collection by credit of the deficiencies for 1921, 1926, 1927, and 1928 was *prima facie* proper until respondents established the contrary.

CONCLUSION

That the District Court had jurisdiction is clear. Petitioner has presented no argument to the contrary, and it sought and was granted review limited to issues jurisdictional in character. The Government's contention goes only to the technical question of existence of a cause of action for the particular years in respect of which suit was brought, it being established that respondents are entitled to prevail upon the merits. In any event, that contention is unsound and is contrary to the view uniformly taken by the authorities.

The judgment of the court below should be affirmed.

Respectfully submitted,

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January, 1939

APPENDIX

STATUTES INVOLVED

Judicial Code, Section 24, Par. 20th, as amended by the Act of February 24, 1925, 43 Stat. 972:

> The district courts shall have original jurisdiction as follows:
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> * * * * * * * * * * * * * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 274 (a):

> Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication

in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

Section 1103:

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 606:

(a) The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is

authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Section 607:

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 609:

(a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

Revenue Act of 1926, c. 27, 44 Stat. 9:

Section 284:

(a) Where there has been an overpayment of any income, war-profits, or excess-profits, tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer * * *.

SUPREME COURT OF THE UNITED STATES.

Nos. 416 and 437.—October Term, 1938.

The United States of America, Petitioner, vs. Bertelsen & Petersen Engineering Company. (416)	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
The United States of America, Petitioner, vs. C. T. Jaffray, R. H. M. Robinson and S. M. Archer, as Trustees of The Estate of Minnesota and Ontario Paper Company. (437)	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 27, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

In each of these causes counsel for the United States maintain the District Court was without jurisdiction to determine the issues. The Circuit Courts of Appeal ruled otherwise and approved judgments for respondents. The collectors who received the excess taxes in question were either dead or out of office when the proceedings to recover were commenced. The question of jurisdiction only is open for our consideration.

Section 145 Judicial Code[1] empowers the Court of Claims to hear and determine claims against the United States arising out of contract, express or implied. Prior to 1921 section 24(20) Judicial Code gave District Courts concurrent jurisdiction when the claim did not exceed Ten Thousand Dollars.[2]

[1] Tucker Act March 3, 1887, c. 359, 24 Stat. 505; Act June 27, 1898, c. 503, 30 Stat. 494; July 1, 1898, c. 546, 30 Stat. 597, 649; February 26, 1900, c. 25, 31 Stat. 33; March 3, 1911, 36 Stat. 1087, 1136; U. S. C. A. Title 28, sec. 250(1).

[2] "The district courts shall have original jurisdiction as follows: . . . . Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or

The Acts of 1921, 1924, 1925 and 1926[3] enlarged the jurisdiction of Districts Courts by adding the following to section 24(20) Judicial Code:

"Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

Section 3226 Revised Statutes as amended and reenacted by Revenue Act 1926, c. 27, sec. 1113(a), 44 Stat. 9, 116, provides—

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, ... No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 3226 was further amended by Act June 6, 1932, c. 209, sec. 1103(a), 47 Stat. 169, 286, so as to read as shown in the margin.[4]

No. 416

The Commissioner of Internal Revenue undertook to deduct more than Ten Thousand Dollars from an admitted overpayment by re-

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any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, ..."
Act March 3, 1911, 36 Stat. 1087, 1091, 1093; U. S. C. A. Title 28, sec. 41(20).

[3] See Act November 23, 1921, c. 136, 42 Stat. 227, 311; June 2, 1924, c. 234, 43 Stat. 253, 348; February 24, 1925, c. 309, 43 Stat. 972; February 26, 1926, c. 27, 44 Stat. 9, 121. U. S. C. A. Title 28, sec. 41(20).

[4] "Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, ... No such suit or proceeding shall be begun . . . after the expiration of two

spondent upon 1917 taxes and to apply this to a declared deficiency for 1918 taxes then barred by the Statute of Limitations. By this suit respondent seeks a judgment for the amount so deducted.

The Circuit Court of Appeals properly held "this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918." Also, rightly we think, that timely and proper claim for the overpayment for 1917 had been made as required by section 3226 Revised Statutes as reenacted 1926.

And we accept the conclusions stated in the following excerpt from its opinion—

"The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34, of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918. It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. Goodrich, Admr. *v.* Coffin, 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund. . . . The suit was one which could have been brought against a Collector, if living, but who is now dead or out of office."

Lowe Bros. Co. v. *United States,* 304 U. S. 302, 303, is not controlling. There the suit was begun in the District Court to recover an overpayment of 1917 taxes the alleged result of a credit made by the Commissioner from an admitted overpayment for 1918. For this no action could have been maintained against the collector—he did not make or authorize the credit. Therefore, the amendment to section 24(20) Judicial Code (28 U. S. C. A. sec. 41(20)) enlarging the jurisdiction of the District Court had no

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years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

U. S. C. A. Title 26, sec. 1672-1673.

application. Here the collector might have been sued since he wrongly received payment on account of 1917 taxes. The present cause falls within the very words of the amendment.

No. 437.

Respondents overpaid internal revenue taxes in sums exceeding Ten Thousand Dollars for 1922, 1923 and 1924; and for 1925, $7,800. The Commissioner issued certificates to that effect August 16, 1933. He refused to repay these sums but undertook to credit them to deficiencies which he assessed against respondents for 1926, 1927, 1928.

Thereupon this suit was brought to recover the overpayments for 1922 to 1925 under section 24(20) Judicial Code as amended (U. S. C. A. Title 28, sec. 41(20)) which gives District Courts jurisdiction in respect of taxes erroneously received by a collector out of office. Respondents maintain that, in fact, there were no deficiencies for 1926, 1927, 1928, and that by attempting to credit overpayments for 1922 to 1925 against non-existing deficiencies the Commissioner in effect denied their claims for refund.

On the other hand petitioner insists, the Commissioner's action in allowing the overpayments and crediting them against alleged deficiencies amounted to payments on account of taxes assessed for 1926 to 1928. And, as it was the Commissioner and not the collector who caused such credit of overpayments to deficiencies, the District Court was without jurisdiction.

The Circuit Court of Appeals held the suit was one to recover overpayments admittedly made to the collector and in respect of which timely claims for refund had been filed.

It said—

"The crediting of the overpayments, by the Commissioner, against taxes due from the taxpayer for other years was a matter of defense, a justification for the failure to refund, and not a matter which destroyed the taxpayer's cause of action or ousted the court of jurisdiction."

This conclusion we think is correct. Other points suggested, so far as presently important, are sufficiently answered by what has been said in No. 416.

Both of the challenged judgments must be affirmed.

Mr. Justice Reed took no part in the consideration or decision of either of these causes.